

Washington International Law Journal

Volume 27 | Number 3

6-1-2018

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Recommended Citation

Shamshad Parsarlay, *The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan*, 27 Wash. L. Rev. 683 (2018).

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THE LIMITS OF CONSTITUTIONAL DEFERRAL: LESSONS FROM THE HISTORY OF THE 2004 CONSTITUTION OF AFGHANISTAN

Shamshad Pasarlay[†]

Abstract: In an important recent work, Rosalind Dixon and Tom Ginsburg noted that constitution writers regularly choose to defer to the future important questions of constitutional design. They argue that an “optimal” level of constitutional deferral might contribute to constitutional stability and help constitutions live longer. This Article argues that although constitution makers might choose to defer on many important questions of constitutional design to promote agreement, certain types of deferral might turn out to be counterproductive, and thus constitution writers’ choice to defer should be limited. The Article highlights that it is risky to defer to future legislatures the powers of institutions (such as apex courts) that are empowered under the constitution to answer other implicit deferrals. Deferring the powers of apex courts is extremely dangerous because such deferrals can potentially politicize the courts’ relationship with the political branches of the government. In response, the political branches of government might choose to resolve deferrals on the powers of apex courts in a retaliatory fashion that could limit the powers of apex courts and undermine the legitimacy and independence. Deferrals on the powers of the judiciary may simply give downstream legislatures a tool to hold apex courts hostage by threatening to amend their laws and strip them of their powers. To highlight this problem, this Article explores the decision of the makers of the 2004 Constitution of Afghanistan to defer on the powers of the Supreme Court and the Independent Commission for the Supervision of the Implementation of the Constitution to interpret the Constitution and exercise all types of judicial review. Afghanistan’s experience operating under the 2004 Constitution gives an important example of the limits of constitutional deferral.

Cite as: Shamshad Pasarlay, *The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan*, 27 WASH. INT’L L.J. 683 (2018).

I. INTRODUCTION

Constitution writers often work under challenging conditions. In an ideal world, they might be able to draft a perfect constitution—one that elaborates fully the values of the state and the decision-making processes by which the state would realize those values in the future. Nevertheless, constitution makers face serious constraints (such as time, political interests, and minimum consensus) that make agreement on important questions a concern for constitution drafting. These constraints most often force constitution makers to defer to the future important questions of constitutional design, including issues of government structure, basic rights,

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and judicially enforceable limits on government conduct.¹ Theorists of constitutional deferral argue that certain types of deferrals can occasionally be useful in promoting productive ongoing negotiations of contested constitutional principles and thus can help a constitution endure longer.² However, these theorists state that deferrals are not optimal for all issues of constitutional design. Specifically, they are not in favor of the idea that constitutions should leave some important questions of governmental structure undecided.³

Building on this insight, this Article explores a type of dangerous deferral in constitutional design. It highlights that constitution makers might choose to defer strategically on many important questions of constitutional design, but not all types of deferral are useful. Certain types of constitutional deferral are indeed counterproductive.⁴ For instance, it is dangerous to defer on the powers of apex courts that are empowered under the constitution to answer other implicit deferrals in a constitution. Deferrals on the powers of apex courts can result in political conflicts between the judiciary and the political branches of the government that can threaten the independence and institutional security of the judiciary.⁵ Moreover, downstream legislatures may refuse to empower courts to resolve implicit constitutional deferrals, leading to critical constitutional crises every time a constitutional dispute emerges between the political branches of the government.

To highlight the dangers associated with deferrals on the powers of apex courts, this Article explores the decision of the makers of the 2004 Constitution of Afghanistan to defer on the powers of the Supreme Court and the Independent Commission for the Supervision of the Implementation of the Constitution (“the Commission”) to interpret the Constitution and exercise all types of judicial review functions. This Article shows how deferrals in this respect exacerbated political tensions between the legislature and the judiciary, creating a political crisis over which institution should

¹ See generally Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636 (2011).

² *Id.*; see also Clark B. Lombardi, *The Constitution as an Agreement to Agree: The Social and Political Foundation (and Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 398, 425–26 (Dennis Galligan & Mila Versteeg eds., 2013).

³ Dixon & Ginsburg, *supra* note 1, at 664–66; see also Hanna Lerner, *Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach*, 16 NATIONS & NATIONALISM 68, 84 (2010).

⁴ Dixon & Ginsburg, *supra* note 1, at 664.

⁵ Lerner, *supra* note 3, at 84.

interpret the Constitution and review the constitutionality of legislation. This Article further shows how the legislature used deferrals to refuse to empower the Supreme Court to exercise its constitutional right to interpret the Constitution and exercise all types of judicial review functions. In fact, the legislature took advantage of deferrals in these areas to undermine the independence and institutional viability of the Supreme Court and the Commission.⁶ On certain occasions, the legislature and the executive threatened to amend the laws that define the powers of the Supreme Court and the Commission—a counterproductive development and one which the Supreme Court and the Commission both have no power to evade.⁷

The rest of this Article is organized as follows: Part II describes the literature on constitutional deferral and constitutional ambiguity. It then discusses the effects of these types of deferrals on both constitutional stability and longevity. Part III explores the decision of the drafters of the 2004 Constitution of Afghanistan to defer the powers of the Supreme Court and the Commission to the ordinary legislature. Part IV explores how deferral on the powers of the Supreme Court and the Commission resulted in direct political confrontation between the judiciary and the legislature, triggering a political crisis over constitutional interpretation and judicial review in Afghanistan. This Part further reveals that the executive and the legislature both took advantage of these deferrals, partially resolving them in a way that served their interests and weakened both the Supreme Court and the Commission. Part V reveals how the legislature is holding the law of the Commission hostage by threatening to amend it and strip the Commission of its powers every time the Commission's decisions do not align with the interests of the legislature.

Finally, Part VI concludes by highlighting that the powers and structure of institutions (such as constitutional courts) entrusted by a constitution to resolve implicit deferrals might be the most important aspect of a constitution and that it needs to be decided at the outset by constitutional framers. By failing to resolve the important issue of the powers of highest courts within a constitution, the framers might render the

⁶ See Shamshad Pasarlay, *When Courts Decide Not to Decide: Understanding the Afghan Supreme Court's Struggle to Decide the Fate of the Dismissed Ministers*, INT'L J. CONST. L. BLOG (Mar. 22, 2017), <http://www.iconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/>.

⁷ *Id.*

day-to-day function of government extremely difficult. Specifically, in fragile and nascent democracies like Afghanistan, the legislature may be ill-suited to define the powers of the judiciary to resolve other implicit deferrals in the Constitution. In fact, downstream legislatures might simply strip the judiciary of such powers. In these contexts, unresolved questions of the powers and organization of highest courts engender costly political crises every time a dispute emerges between the legislature and the executive over a constitutional question.

II. THE THEORY OF CONSTITUTIONAL DEFERRAL

In many countries, the moment of constitution-making is often considered an exceptional period of time, one in which the society's focus on constitutional provisions and on the rewards of consensus create unique opportunities. According to this view, constitution makers should thus be encouraged to answer foundationally important questions about the state up front so that the polity can move on with a shared set of values and commitments to the state.⁸ It is at this founding moment that a society is most likely to get the best possible answers on fundamental questions of constitutional design. However, at the same time, the moment of constitutional founding is also a dangerous period of time riddled with high passions and interests. Drafting a constitution under such conditions usually involves making choices under constraints, including lack of agreement, resources, time, and information.⁹ These constraints might lead to significant "decision" and "error" costs if drafters attempt to answer all important questions of constitutional design at the time of constitution writing.¹⁰

Moreover, in deeply divided societies,¹¹ the constitutional founding moment is considered the worst possible time for people to try and settle

⁸ See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer ed. & trans., 2008); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364 (1995).

⁹ See generally Elster, *supra* note 8.

¹⁰ Dixon & Ginsburg, *supra* note 1, at 641–46.

¹¹ A society is deeply divided if it (1) contains a variety of different ethnic, religious, linguistic, or cultural communities; and (2) the ethno-cultural, religious, or other societal cleavages in the society form basis of political mobilization and translate into political fragmentation over a substantial period of time and a wide variety of issues. See Ian Lustick, *Stability in Deeply Divided Societies: Constitutionalism versus Control*, 31 *WORLD POL.* 325 (1979); Sujit Choudhry, *Bridging Comparative Politics and*

foundational questions of constitutional design, including questions of national identity and religious values.¹² In countries marked by such divisions, the process of constitution-making is fraught with great risk of political crisis.¹³ In these deeply divided societies, it might not be productive to pressure groups with different ethnic and/or religious identities to agree in advance upon foundational questions of national and religious identity. Because there is no minimum consensus, if people of a deeply divided society focus on these foundational questions at the drafting stage, it will only highlight their differences and might lead to political crisis.¹⁴ Each ethno-religious community might try to use the constitutional process to maximize its own interests, making agreement on foundational questions of a polity extremely difficult.

As a result, to avoid costs associated with constitutional design and promote agreement at the drafting stage, constitution makers sometimes choose to leave some significant questions undecided, or defer them to the future.¹⁵ Specifically, in deeply divided countries, constitutional deferral plays a constructive role. It enables constitution framers to distract attention from the most divisive issues until after institutions and habits of democratic discourse have taken root, allowing these societies to create workable arrangements by which less fundamental issues can be resolved to people's mutual satisfaction.¹⁶ In short, deferral allows deeply divided countries to keep the debate on controversial issues ongoing and resolve them through constructive dialogue after the drafting stage.

Rosalind Dixon and Tom Ginsburg define constitutional deferral as a conscious decision by constitution writers not to decide a contentious (though equally important) question of constitutional design in the constitution, thereby leaving it to be decided through the process of ordinary politics by ordinary institutions, namely the legislature and the judiciary.¹⁷

Comparative Constitutional Law: Constitutional Design in Divided Societies, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION 5 (Sujit Choudhry ed., 2008).

¹² See generally HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011); see also Asli Bâli & Hanna Lerner, *Constitutional Design without Constitutional Moment: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L. L.J. 227, 228–29 (2016).

¹³ See LERNER, *supra* note 12, at 1; see also Lerner, *supra* note 3, at 68–69.

¹⁴ See Bâli & Lerner, *supra* note 12, at 228–29; see also Lerner, *supra* note 3.

¹⁵ Dixon & Ginsburg, *supra* note 1, at 636–37; see also Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 2007 (2013).

¹⁶ See LERNER, *supra* note 12; Bâli & Lerner, *supra* note 12, at 293.

¹⁷ See Dixon & Ginsburg, *supra* note 1, at 637.

That is to say, constitution makers often avoid any attempt to resolve in the constitutional text certain important constitutional questions.¹⁸ Instead, they leave future political institutions freedom to resolve those questions at some less fraught time in the future when greater consensus is formed and the risk of decision and error cost has faded.¹⁹

Theorists of constitutional deferral have identified several different types of constitutional deferral. The first type explicitly identifies an important issue of constitutional design and states that it is to be resolved by the future legislature after the constitution is promulgated.²⁰ This type of deferral uses a “by-law clause” in the text of the constitution, and is the method on which Dixon and Ginsburg focus their attention.²¹ Deferrals through by-law clauses indicate that constitution writers wish to constitutionalize an important question of constitutional design in some form, but because of the lack of agreement on the answers to such questions and/or lack of information that might lead to decision costs, they do not attempt to answer them in the text of the constitution.²² Constitution designers instead choose to leave these questions for future resolution by the legislature.²³

Another common form of deferral is implicit constitutional deferral, or deferral of significant constitutional questions to constitutional courts.²⁴ In this case, constitution writers strategically and deliberately use unclear, ambiguous, or ambivalent language to describe a structural constitutional rule or a constitutional right, thus implicitly deferring particular constitutional provisions to the future.²⁵ Implicit constitutional deferral thus does not attempt to resolve a controversial question in the constitution. Instead, it requires that the ambiguous constitutional rule should be interpreted and resolved in the future by institutions entrusted by the

¹⁸ *Id.*

¹⁹ *Id.* at 638.

²⁰ Tushnet, *supra* note 15, at 2009; Dixon & Ginsburg, *supra* note 1, at 643–46.

²¹ Dixon & Ginsburg, *supra* note 1, at 639–50.

²² *Id.* at 639–40.

²³ *Id.*

²⁴ Tushnet, *supra* note 15, at 2007; Lombardi, *supra* note 2, at 409.

²⁵ Lombardi, *supra* note 2, at 409; *see also* CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 96 (2001) (discussing the strategic uses of ambiguity and deferral in constitution-drafting).

constitution that have the power to interpret the constitution and resolve constitutional ambiguities.²⁶

Scholars of constitutional deferral are not only interested in typologizing deferral but also in its impacts on constitutional optimality, longevity, and stability.²⁷ They argue that an “optimal” level of constitutional deferral can occasionally be useful in promoting productive ongoing negotiations of constitutional principles and thus might contribute to constitutional stability and help constitutions survive longer.²⁸ This Article does not intend to question this claim. In fact, the history of Afghan constitutions in general, and that of the 2004 Constitution in particular, provides evidence to support the claim that an optimal level of constitutional deferral might help constitutions endure longer.²⁹

However, constitutional deferrals are not optimal for all issues of constitutional design. Dixon and Ginsburg point out that it is important that constitution writers do not rely on deferral too much. They must settle within the constitution certain basic procedural questions that are important and enable the democratic function of the government.³⁰ Theorists of constitutional deferral warn that deferral should not impede the ability of government institutions (legislatures or courts) to resolve key constitutional questions in the future.³¹ This impediment will negatively impact the survival and the expected optimality of constitutions. These types of deferrals are likely “to undermine popular support for the existing constitutional system in a way that also increases support for efforts to create new governmental arrangements by extra-constitutional means.”³² This is exactly what happened in Afghanistan in the 1970s.³³ The 1964 Afghan

²⁶ Lombardi, *supra* note 2, at 409.

²⁷ Dixon & Ginsburg, *supra* note 1, at 643–46; Lombardi, *supra* note 2, at 409; Shamshad Pasarlay, *Rethinking Afghanistan’s Longest-Lived Constitution: The 1931 Constitution Through the Lens of Constitutional Endurance and Performance Literature*, 10 ELON L. REV. 101 (forthcoming 2018) [hereinafter Pasarlay, *Rethinking Afghanistan’s Longest-Lived Constitution*].

²⁸ Dixon & Ginsburg, *supra* note 1, at 663–67; Lombardi *supra* note 2, at 426.

²⁹ See Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory*, 261–302 (June 10, 2016) (unpublished Ph.D. dissertation, University of Washington) (on file with author) [hereinafter Pasarlay, *Making the 2004 Constitution of Afghanistan*]; see also Pasarlay, *Rethinking Afghanistan’s Longest-Lived Constitution*, *supra* note 27, at 104.

³⁰ Dixon & Ginsburg, *supra* note 1, at 664.

³¹ *Id.* at 666; see also Lerner, *supra* note 3, at 84.

³² Dixon & Ginsburg, *supra* note 1, at 666.

³³ See generally Mohammad Hashim Kamali, *The Fall of a Monarchy in Afghanistan*, 9 INT’L. J. MIDDLE EAST STUD. 195 (1978).

Constitution had legalized the formation of political parties, but it deferred to the legislature to define the structure and organizations of political parties.³⁴ However, the implementing legislation was never ratified. This failure not only deprived Afghanistan of an important tool for institutionalizing democracy, but it also led to the collapse of the 1964 constitutional order and the monarchy that it had established.³⁵

Similarly, the history of the 2004 Constitution of Afghanistan thus far indicates that it is important that constitution makers settle the powers of apex courts that are expected to resolve other implicit deferrals. Authorizing downstream legislatures to define the powers of the judiciary by using a by-law clause in the constitution is extremely dangerous. These deferrals might result in direct political conflicts between the legislature and the judiciary that may in turn undermine the judiciary's independence and institutional security. In other words, deferrals on the powers and organization of apex constitutional courts might mean that these courts fail to resolve fundamental constitutional questions in the future. These dangers can affect the expected optimality, stability, and longevity of written constitutions and, in nascent democracies like Afghanistan, might create serious problems by making constitutions more fragile.

III. THE 2002–2004 CONSTITUTION-MAKING PROCESS: THE HISTORY OF THE DRAFTING OF ARTICLES 121 AND 157 OF THE 2004 CONSTITUTION

Following the removal of the Taliban regime in October 2001, the United Nations (“UN”) brought together leading Afghan groups to Bonn, Germany, to discuss plans for a future government in Afghanistan.³⁶ The meeting in Germany resulted in the signing of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, commonly known as the Bonn Agreement (“the Agreement”).³⁷ The Agreement set up a timetable for a two-year transitional

³⁴ THE CONSTITUTION OF AFGHANISTAN [AFG. CONST. 1964] [CONSTITUTION] Oct. 1, 1964, art. 32.

³⁵ See Mohammad Hasan Kakar, *The Fall of the Afghan Monarchy in 1973*, 9 INT’L J. MIDDLE E. STUD. 195, 199, 207–08, 214 (1978).

³⁶ See generally ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* (2016); see also JAMES DOBBINS, *AFTER THE TALIBAN: NATION-BUILDING IN AFGHANISTAN* (2008); Chris Johnson et al., *AFGHANISTAN’S POLITICAL AND CONSTITUTIONAL DEVELOPMENT*, OVERSEAS DEV. INST. 3 (2003).

³⁷ J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 566 (2007).

period.³⁸ It established an interim government that would be followed by a transitional administration.³⁹ The Transitional Administration was responsible for drafting a new constitution within eighteen months after it was established.⁴⁰ The Transitional Administration initiated the constitution-making process in October 2002 when President Hamid Karzai appointed the Constitutional Drafting Commission to prepare a first draft of the new constitution.⁴¹ The process ended in January 2004 when President Karzai signed and promulgated the new Constitution of Afghanistan.⁴²

The text of the 2004 Constitution of Afghanistan makes clear that the people involved in its drafting and revision engaged in systematic constitutional deferrals.⁴³ Deferrals in the 2004 Constitution of Afghanistan came explicitly through by-law clauses and, in some places, implicitly through strategic ambiguity.⁴⁴ For instance, the framers of the 2004 Constitution engaged in very heated debates over ideology, particularly over the question of whether Islamic values or liberal principles should place limits on legislative and executive discretion.⁴⁵ However, when the Constitution was written, the drafters managed to develop ambiguous formulas that did not seem to resolve the contested ideological questions.⁴⁶ All factions involved in the 2002–2004 constitutional negotiations appeared to have found the language acceptable even though (and perhaps because) it was ambiguous and open to multiple interpretations, thus leaving to another time and another institution the question of what types of ideological principles the government would have to respect.⁴⁷

In many other places, the makers of the 2004 Constitution apparently chose to defer explicitly through adopting by-law clauses in the text of the

³⁸ See generally U.N. Secretary General, Letter dated Dec. 5, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

³⁹ *Id.* ¶¶ I.1–4.

⁴⁰ *Id.* ¶ 6.

⁴¹ Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, J. DEMOCRACY, July 2004, at 5, 10.

⁴² See generally *id.*

⁴³ Pasarlay, Making the 2004 Constitution of Afghanistan, *supra* note 29, at 173.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Nathan J. Brown, *Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani, and Iraqi Constitutional Experiments*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST WITH SPECIAL REFERENCES TO TURKEY, IRAQ, IRAN AND AFGHANISTAN 72 (Said Amir Arjomand ed., 2008).

⁴⁷ *Id.*

Constitution.⁴⁸ For instance, the text of the 2004 Constitution attempts to guarantee liberal democracy and governance by providing a long list of protected rights and freedoms, including social, political, and property rights.⁴⁹ Nevertheless, the Constitution does not simply declare most rights to be constitutionally guaranteed. Rather, it attempts to constitutionalize basic rights in some ways and instructs the downstream legislature through the adoption of by-law clauses to define the scope of the protected rights and freedoms and then to enact laws that would define the powers of the institutions that will protect those rights.⁵⁰

In this way, the makers of the 2004 Constitution of Afghanistan deployed deferral as a strategic tool.⁵¹ In fact, constitutional deferral helped them to reach agreement and build minimum consensus on many contentious questions of constitutional design at the drafting stage, including basic rights and the ideology of the state.⁵² In a perfect scenario, the drafters of the 2004 Constitution might have elaborated more fully the values of the state and the scope of liberal rights that the Constitution purported to guarantee. However, in a situation where Afghanistan's powerful and well-armed divided communities did not agree on foundational issues, they accepted that the final deal would have to be negotiated incrementally.⁵³ Both Afghan elites and society seem to be happy maintaining the deferred order on these aspects of constitutional design and have opted to resolve them over time as greater consensus is forged.⁵⁴

A. *The Drafters' Decision to Defer the Powers of the Supreme Court and the Commission to Exercise Judicial Review*

Judicial review and constitutional interpretation—particularly, the question of where to vest the power to issue binding judicial review opinions—was a contentious issue during the drafting of the 2004 Constitution of Afghanistan.⁵⁵ At first, the makers of the 2004 Constitution

⁴⁸ Pasarlay, Making the 2004 Constitution of Afghanistan, *supra* note 29, at 172–260.

⁴⁹ QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [AFG. CONST. 2004] [CONSTITUTION] Jan. 26, 2004, arts. 22–57.

⁵⁰ *Id.*

⁵¹ Pasarlay, Making the 2004 Constitution of Afghanistan, *supra* note 29, at 261–66.

⁵² *Id.* at 172–302.

⁵³ *Id.* at 261–302.

⁵⁴ *Id.*

⁵⁵ Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, INT'L J. CONST. L. BLOG (Mar. 18, 2015), <http://www.icconnectblog.com/2015/03/>

proposed a separate and independent constitutional court with explicit powers to interpret the Constitution and exercise constitutional review.⁵⁶ However, the then-president of Afghanistan, Hamid Karzai opposed the constitutional court, arguing that it would become something like the Iranian Council of Guardians that would use constitutional provisions, specifically those dealing with Islam and the *sharia*, to undermine the political system and strike down legislation on religious grounds.⁵⁷ Karzai and his allies ultimately succeeded in removing the constitutional court from the draft Constitution before the draft was adopted.⁵⁸

When the makers of the 2004 Constitution dropped the proposed constitutional court, they vested the Supreme Court with the power to exercise judicial review and interpret the Constitution.⁵⁹ Article 121 of the draft Constitution, submitted to the Constitutional *Loya Jirga* (the popular body that adopted the 2004 Constitution) for approval, stated: “at the request of the government and courts, the Supreme Court shall review the compliance of laws, legislative decrees and international treaties with the constitution; the Supreme Court shall have the power to *interpret* laws, legislative decrees, international treaties and the *Constitution*.”⁶⁰

During debates at the Constitutional *Loya Jirga* (“CLJ”), judicial review and constitutional interpretation once again took center stage. The majority of the delegates at the CLJ opposed the provisions of the draft Constitution that gave the Supreme Court the power to exercise judicial review and interpret the Constitution.⁶¹ They complained that such a cleric-dominated Supreme Court would compromise fundamental rights, especially the rights of women and minorities, by using vague *sharia* law provisions,

constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/ [hereinafter, Pasarlay, *Constitutional Interpretation*]; see also John Dempsey & J. Alexander Thier, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, PEACE BRIEFING (U.S. Inst. of Peace, Washington, D.C.), Mar. 2009, http://www.usip.org/sites/default/files/USIP_0309_2.PDF.

⁵⁶ See Pasarlay, *Constitutional Interpretation*, *supra* note 55; Dempsey & Thier, *supra* note 55.

⁵⁷ See Pasarlay, *Constitutional Interpretation*, *supra* note 55; Dempsey & Thier, *supra* note 55.

⁵⁸ Said Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. REV. 943, 959 (2005).

⁵⁹ Constitutional Drafting Comm’n, Draft Constitution of Afghanistan as Revised by the Executive, art. 121 (Dec. 2003) (on file with author) [hereinafter Const. Draft of 2003].

⁶⁰ *Id.* (emphasis added).

⁶¹ Int’l Crisis Grp., *Reforming Afghanistan’s Broken Judiciary*, at 16, Asia Report No. 195 (Nov. 17, 2010), <https://www.files.ethz.ch/isn/124332/195%20Reforming%20Afghanistans%20Broken%20Judiciary.pdf>.

such as Article 3 of the Constitution, as justification.⁶² Article 3 states that “no law shall contradict the provisions and the beliefs of the sacred religion of Islam.”⁶³ The proponents of the constitutional court argued that the Supreme Court, as it was then comprised of *mullahs* (those versed in *sharia* law only), who were not trained in public law or constitutional law, should not be the institution to interpret the Constitution and exercise judicial review.⁶⁴ Karzai and his supporters, however, continued to argue against including a constitutional court in the country’s next Constitution.⁶⁵

The discussion over the constitutional court at the CLJ seemed to be going nowhere, “ending in deadlock between the majority of the CLJ members and the supporters of President Karzai.”⁶⁶ To break the stalemate and achieve a minimum agreement on which institution should interpret the Constitution, the CLJ and President Karzai ultimately agreed on a Commission that would oversee the implementation of the Constitution.⁶⁷ Although it was no replacement for a constitutional court, the CLJ hoped that the establishment of the Commission would go “a small way to repair the absence of a constitutional court and may one day counter the clerical domination of the Supreme Court.”⁶⁸ However, the final draft Constitution did not clarify how the Commission was to be organized and what powers it would enjoy.⁶⁹ It remained intentionally unclear whether the Commission was empowered to issue binding substantive interpretations of the Constitution, meaning that the Commission would interpret the Constitution and the Supreme Court would be obliged to rule in accordance with the Commission’s reading of the Constitution.

B. *The Commission and Its Unclear Mandate*

Although the CLJ finalized the 2004 Constitution, it did not define the powers of the Commission. In other words, the CLJ deferred the powers of

⁶² *Id.* at 8; Arjomand, *supra* note 58, at 959.

⁶³ AFG. CONST. 2004 art. 3.

⁶⁴ Int’l Crisis Grp., *Afghanistan: The Constitutional Loya Jirga*, at 8–9, Asia Briefing No. 29 (Dec. 12, 2003), <https://d2071andvip0wj.cloudfront.net/afghanistan-the-constitutional-loya-jirga.pdf>; *see also* Rubin, *supra* note 41, at 15.

⁶⁵ Pasarlay, *Constitutional Interpretation*, *supra* note 55; Dempsey & Thier, *supra* note 55.

⁶⁶ Pasarlay, *Making the 2004 Constitution of Afghanistan*, *supra* note 29, at 250.

⁶⁷ Arjomand, *supra* note 58, at 960.

⁶⁸ *Id.*

⁶⁹ Constitutional Drafting Comm’n, *Draft Constitution of Afghanistan as Adopted by the Constitutional Loya Jirga*, art. 157 (Jan. 2004) (on file with author) [hereinafter Const. Draft of 2004].

the Commission to the legislature. The CLJ-approved version of the Commission in draft Article 157 looked like the following: “An Independent Commission for the Supervision of the Implementation of the Constitution should be established *in accordance with the provisions of the law*.”⁷⁰ Article 157 is deliberately ambiguous as to whether the Commission is empowered to interpret the Constitution or exercise judicial review.

This last minute inclusion of the Commission into the draft Constitution begot confusion over which institution should exercise all forms of judicial review and interpret the Constitution.⁷¹ The confusion arose primarily because of the explicit and implicit deferrals in Articles 121 and 157 of the CLJ draft, especially due to the changes that the CLJ brought to Article 121 of the draft Constitution.⁷² Before the inclusion of Article 157,⁷³ Article 121 of the draft Constitution read: “At the request of the government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties as well as international covenants for their compliance with the constitution. The Supreme Court can *interpret* laws, legislative decrees and the *Constitution*.”⁷⁴

This language in draft Article 121 clearly settled the powers of the Supreme Court and contained no deferrals. However, the language in draft Article 121 changed after the CLJ inserted Article 157 in its finalized draft. The final version of Article 121 reads: “At the request of the government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution, *and interpret them in accordance with the law*.”⁷⁵

Unlike the earlier versions of Article 121, in the final version of Article 121, the Supreme Court is not clearly authorized to interpret the Constitution.⁷⁶ The final version of Article 121 directs the Supreme Court to “interpret them in accordance with the law,” making it difficult to understand whether or not this includes the interpretation of the

⁷⁰ *Id.* (emphasis added).

⁷¹ MOHAMMAD HASHIM KAMALI, AFG. RESEARCH & EVALUATION UNIT, AFGHANISTAN’S CONSTITUTION TEN YEARS ON: WHAT ARE THE ISSUES? 13–14 (2014), <https://areu.org.af/wp-content/uploads/2014/08/1416-EAfghanistans-constitution-ten-years-on-English.pdf>.

⁷² *Id.*

⁷³ Article 157 established the Commission.

⁷⁴ Const. Draft of 2003, *supra* note 59, art. 121 (emphasis added).

⁷⁵ *Id.* (emphasis added).

⁷⁶ KAMALI, *supra* note 71, at 14.

Constitution.⁷⁷ The matter was complicated because Article 157 did not make clear whether or not the Commission is tasked with interpreting the Constitution.⁷⁸ In fact, both Articles 121 and 157 of the 2004 Constitution signal deferral through by-law clauses and through strategic constitutional ambiguity. They do not define the powers of these institutions clearly. Instead, they leave it to the legislature to adopt a separate law that would define the powers and organization of the Commission and the powers of the Supreme Court to exercise judicial review.⁷⁹

This type of constitutional deferral is extremely dangerous. Although these deferrals arguably promoted agreement at CLJ negotiations, they later became the crux of a political crisis over which institution, the Supreme Court or the Commission, should interpret the Constitution and review the constitutionality of laws and legislative decrees.⁸⁰ They particularly polarized the relationship between the legislature and the Supreme Court and undermined the Supreme Court's legitimacy, independence, and institutional viability.⁸¹ Moreover, the legislature used these constitutional deferrals to refuse to empower the Supreme Court to interpret the Constitution and exercise all types of judicial review functions and to strike at the independence of the Commission.⁸² In short, deferrals on the powers of the Supreme Court and the Commission led to the inability of both institutions to resolve key constitutional issues.

IV. THE UNINTENDED CONSEQUENCES OF DEFERRALS ON THE POWERS OF THE SUPREME COURT AND THE COMMISSION

The makers of the 2004 Constitution of Afghanistan deliberately used deferral as a tool to promote agreement and prevent decision and error costs.⁸³ Some of these deferrals, such as those on the questions of ideology

⁷⁷ *Id.*

⁷⁸ Const. Draft of 2003, *supra* note 59, art. 157.

⁷⁹ *Id.* arts. 121, 157.

⁸⁰ Pasarlay, *Constitutional Interpretation*, *supra* note 55; Dempsey & Thier, *supra* note 55.

⁸¹ See KAMALI, *supra* note 71, at 10–14.

⁸² See Shamshad Pasarlay, *When Courts Decide Not to Decide: Understanding the Afghan Supreme Court's Struggle to Decide the Fate of the Dismissed Ministers*, INT'L J. CONST. L. BLOG (Mar. 22, 2017), <http://www.iconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/> [hereinafter Pasarlay, *When Courts Decide Not to Decide*].

⁸³ Pasarlay, *Making the 2004 Constitution of Afghanistan*, *supra* note 29, at 261–302.

of the state and fundamental rights, have proven successful.⁸⁴ These deferrals promoted agreement during the 2002–2004 constitution-making process and have helped the 2004 Constitution survive for more than fourteen years thus far.⁸⁵ Although there has never been clear political or judicial action clarifying the meaning and the practical impact of the vague ideological clauses in the 2004 Constitution, the Afghan government and society both seem to be comfortable leaving the question to the future, at which point they will have to clarify what these clauses mean and what practical constraints they place on the government. Therefore, this deferral arguably leads to the survival of the 2004 Constitution into the distant future.⁸⁶

However, some of the deferrals in the 2004 Constitution have not been successful. The history of the 2004 Constitution thus far suggests that deferrals on the powers and organization of the Supreme Court and the Commission have not fared well. In the absence of clear constitutional provisions settling the very important question of the powers of the Supreme Court and the Commission, the political branches of the government—the executive and the legislature—took the responsibility to define the power and organization of these two institutions.⁸⁷ However, the legislature and the executive prepared legislation in a way that attempted to increase their control and influence over both the Supreme Court and the Commission.⁸⁸ In fact, the executive and the legislature competed with each other to get the most out of this ambiguous constitutional formula.⁸⁹ The powers, independence, and institutional security of the Supreme Court and the Commission were the ultimate victims of the rivalry between the executive and the legislature to exert influence on the Supreme Court and the Commission.⁹⁰

Initially, after the 2004 Constitution was promulgated, the Supreme Court assumed the power to interpret the Constitution, provide legal advice,

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

and exercise all judicial review functions.⁹¹ From 2005 to 2007, the Supreme Court issued a number of decisions and tried to claim jurisdiction over disputes stemming from the implementation of law and the exercise of legal authority between the legislature and the executive.⁹² For example, after the 2004 presidential elections and the 2005 elections for the Parliament's lower house, the Afghan government failed to hold district council elections.⁹³ As a result, the upper house of the Parliament could not be constitutionally elected because one-third of its members were to be from district councils.⁹⁴ President Karzai asked the Supreme Court to rule on how to constitute the upper house properly in the absence of district council elections.⁹⁵ The Supreme Court ruled that, when district council elections are not held, provisional councils should elect two-thirds of the members of the upper house.⁹⁶ In normal circumstances, provisional councils elect one-third of the members of the upper house.⁹⁷ Based on the opinion of the Supreme Court, provincial councils elected two-thirds of the upper house.

Similarly, in 2006, another constitutional dispute emerged between the legislature and the executive over the meaning of the word "*akthariyyat*" (majority) in parliamentary votes to approve governmental ministers and Supreme Court justices.⁹⁸ The question was whether "majority votes" included the majority votes of all members of the Parliament or the majority votes of those members present in a particular parliamentary session.⁹⁹ Again, President Karzai asked the Supreme Court to rule on this question.¹⁰⁰ The Supreme Court held that *akthariyyat* in parliamentary votes to approve

⁹¹ *Id.*; see also KAMALI, *supra* note 71, at 11 n.38; Mohammad Qasim Hashimzai, *The Separation of Power and the Problem of Constitutional Interpretation in Afghanistan*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 675–76 (Rainer Grote & Tilmann J. Roder eds., 2012).

⁹² For a number of these Supreme Court decisions, see Hashimzai, *supra* note 91, at 678–80.

⁹³ KAMALI, *supra* note 71, at 11 n.38.

⁹⁴ Article 140 of the Constitution states that councils shall be established to organize activities as well as attain active participation of the people in provincial administrations, in districts and in villages in accordance with the provisions of the law. Local residents shall elect members of these councils for three years through free, general, secret and direct elections. AFG. CONST. 2004 art. 140.

⁹⁵ See generally Scott Worden & Sylvana Q. Sinha, *Constitutional Interpretation and the Continuing Crisis in Afghanistan*, PEACE BRIEFING (U.S. Inst. of Peace, Washington, D.C.) (Nov. 7, 2011) <https://www.usip.org/sites/default/files/PB%20113.pdf>; KAMALI, *supra* note 71, at 11 & n.38.

⁹⁶ Worden & Sinha, *supra* note 95; KAMALI, *supra* note 71, at 11 & n.38.

⁹⁷ See AFG. CONST. 2004 art. 84.

⁹⁸ KAMALI, *supra* note 71, at 11 & n.38.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

cabinet ministers and the Supreme Court justices meant the majority votes of members present in a particular parliamentary session.¹⁰¹

The Supreme Court's decisions were apparently accepted, and they seemed to demonstrate that the Supreme Court possessed the final legal authority to invalidate legislation, interpret the Constitution, and resolve political disputes between the political branches of the government.¹⁰² During this time, the legislature did not exercise its right to resolve constitutional deferrals on the powers of the Supreme Court and the Commission.¹⁰³ As a result, the Supreme Court continued to exercise its right to perform judicial review and interpret the Constitution without any opposition.¹⁰⁴

A. *Resolving Deferrals on the Powers of the Supreme Court and the Commission*

In May 2007, the Afghan Parliament voted to remove the then-Foreign Minister, Rangin Dadfar Spanta, from his ministerial post. The Parliament accused the Foreign Minister of failing to prevent the forceful deportation of Afghan refugees from Iran.¹⁰⁵ President Karzai did not recognize the Parliament's decision and challenged the Parliament's removal powers before the Supreme Court.¹⁰⁶ The Supreme Court ruled that, although the Parliament had an implied constitutional right to remove a government minister, the Parliament did not follow appropriate procedures in removing Minister Spanta.¹⁰⁷ The Parliament refused to acknowledge the Supreme Court's ruling, arguing that the Supreme Court did not have the power to invalidate the Parliament's decision to remove government ministers under Article 121 of the Constitution.¹⁰⁸ The Parliament maintained that Article 121 of the Constitution only gave the Supreme Court

¹⁰¹ *Id.*; see also Hashimzai, *supra* note 91.

¹⁰² Worden & Sinha, *supra* note 95.

¹⁰³ See generally Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 HEIDELBERG J. INT'L L. 897 (2004).

¹⁰⁴ Hashimzai, *supra* note 91.

¹⁰⁵ *Id.*; see also *Iran Deports Thousands of Illegal Afghan Workers*, IRIN NEWS (Apr. 30, 2007), <http://www.irinnews.org/report/71865/afghanistan-iran-iran-deports-thousands-of-illegal-afghan-workers>.

¹⁰⁶ See generally Dempsey & Thier, *supra* note 55.

¹⁰⁷ *Id.*; KAMALI, *supra* note 71, at 10; FARID HAMIDI & ARUNI JAYAKODY, AFG. RESEARCH & EVALUATION UNIT, SEPARATION OF POWERS UNDER THE AFGHAN CONSTITUTION: A CASE STUDY 24–26 (2015), <https://reliefweb.int/sites/reliefweb.int/files/resources/Seperation%20of%20Powers%20Under%20the%20Afghan%20Constitution-%20A%20Case%20Study.pdf>.

¹⁰⁸ HAMIDI & JAYAKODY, *supra* note 107, at 27.

the power to review the constitutionality of laws, not the power to invalidate Parliament's power to appoint or remove a government minister.¹⁰⁹ In other words, the Parliament argued that the Supreme Court did not have jurisdiction to resolve political disputes between the legislature and the executive. As such, confusion arose over which institution could resolve such disputes.¹¹⁰

In response to this crisis, the executive and the legislature both tried to clarify the jurisdiction of the Supreme Court and the Commission by opting to resolve constitutional deferrals in Articles 121 and 157.¹¹¹ They chose to adopt the constitutionally-mandated legislation that would define the powers and organization of the Supreme Court and the Commission.¹¹² However, the executive and the legislature designed the constitutionally-mandated laws in a way that would considerably increase the control of the political branches over the judiciary, thereby weakening both the Supreme Court and the Commission.¹¹³ These laws specifically limited the powers of the Supreme Court and the Commission to safeguard the Constitution. They stripped the Supreme Court of its power to exercise all types of judicial review and to interpret the Constitution.¹¹⁴

To resolve this jurisdictional question, the Supreme Court first proposed legislation that would clarify its authority.¹¹⁵ Specifically, the Supreme Court proposed an amendment to the Law on the Organization and Jurisdiction of the Courts (2005). The amendment would explicitly allow the Supreme Court to exercise judicial review, interpret the Constitution, and resolve other disputes resulting from the application of law and the exercise of legal authority between the legislature and the executive (cases like that of Minister Spanta).¹¹⁶ However, the Parliament rejected the Supreme Court's amendment proposal. It declared that, under Article 121, the Supreme Court did not have the power to interpret the Constitution,

¹⁰⁹ See generally Dempsey & Thier, *supra* note 55.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*; HAMIDI & JAYAKODY, *supra* note 107, at 27.

¹¹³ See Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82; see also Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹¹⁴ See generally Dempsey & Thier, *supra* note 55; Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹¹⁵ See generally Dempsey & Thier, *supra* note 55.

¹¹⁶ *Id.*

invalidate the Parliament's power to remove a government minister, or resolve political disputes between the legislature and the executive.¹¹⁷

When the Parliament rejected the Supreme Court's proposed amendment to the Law on the Organization and Jurisdiction of the Courts, the executive drafted a law on the Commission under Article 157 of the Constitution attempting to resolve the constitutional deferral.¹¹⁸ This law would have allowed the Commission to perform *a priori* review of governmental bills before the Parliament's approval and provide legal advice to the president on questions emerging from the Constitution.¹¹⁹ The executive's proposed legislation also empowered the Commission to review the laws of previous governments for their compliance with the Constitution and advise the president in this respect; the president would then take the required action.¹²⁰ Nevertheless, the Parliament amended the draft law of the Commission. The Parliament removed the explicit language that empowered the Commission to provide an advisory opinion on legislation before the approval of the Parliament.¹²¹ Instead, the Parliament included a provision that vested in the Commission the power to interpret the Constitution on the request of the president, the Parliament, and the Supreme Court.¹²²

President Karzai vetoed this legislation because he believed that the language in Article 8 of the law of the Commission, which empowered the Commission to interpret the Constitution, violated the Constitution.¹²³ President Karzai specifically argued that: (1) Article 121 of the Constitution empowered only the Supreme Court to interpret the Constitution and (2) the Constitution gave the Commission only the power to oversee the implementation of the Constitution and not the authority to interpret it.¹²⁴ The Parliament overrode President Karzai's veto by two-thirds majority, making it enforceable legislation.¹²⁵ President Karzai then asked the

¹¹⁷ *Id.*

¹¹⁸ HAMIDI & JAYAKODY, *supra* note 107, at 27–28.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally Dempsey & Thier, *supra* note 55.

¹²² The Law of Independent Commission for Overseeing the Implementation of Constitution art. 8(1), OFFICIAL GAZETTE No. 986, (2009).

¹²³ HAMIDI & JAYAKODY, *supra* note 107, at 27; Dempsey & Thier, *supra* note 55.

¹²⁴ HAMIDI & JAYAKODY, *supra* note 107, at 27.

¹²⁵ Article 94 of the Constitution authorizes the parliament to override the veto of the president by two-thirds majority. AFG. CONST. 2004 art. 94.

Supreme Court to rule on the constitutionality of the Commission's law.¹²⁶ The Supreme Court ruled that Article 8(1) of the law of the Commission, which authorized the Commission to interpret the Constitution, was unconstitutional.¹²⁷ The Supreme Court held that the drafters of the 2004 Constitution intended for the Supreme Court to be the only institution to interpret the Constitution.¹²⁸ The Commission was intended to supervise the implementation of the Constitution and it did not have the right to interpret the Constitution.¹²⁹

The Parliament once again rejected the Supreme Court's ruling, stating that, although the Supreme Court had the power to review the constitutionality of legislation, it faced "a conflict of interest" in invalidating the law of the Commission.¹³⁰ Consequently, the Parliament refused to amend the law of the Commission to accommodate the opinion of the Supreme Court.¹³¹ Finally, notwithstanding the decision of the Supreme Court, in May 2010, the Parliament moved to approve candidates appointed by President Karzai for membership in the Commission under its "spuriously passed legislation."¹³² In a June 2010 parliamentary session convened to approve the members of the Commission, Commission nominees openly acknowledged that they would exercise the Commission's authority to interpret the Constitution and provide legal advice so long as it maintained the support of the Parliament.¹³³ Upon its creation, and backed strongly by the Parliament, the Commission undertook the task of interpreting the Constitution despite opposition from the executive and the Supreme Court.¹³⁴ However, it remains unclear whether or not the Commission's opinions are binding.¹³⁵

¹²⁶ HAMIDI & JAYAKODY, *supra* note 107, at 27; KAMALI, *supra* note 71, at 10; *see generally* Dempsey & Thier, *supra* note 55.

¹²⁷ Opinion of the Supreme Court on the Constitutionality of the Law of Independent Commission for Overseeing the Implementation of Constitution, OFFICIAL GAZETTE No. 986 (2009).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ HAMIDI & JAYAKODY, *supra* note 107, at 28; *see also* Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹³¹ Int'l Crisis Grp., *supra* note 61, at 16.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See* Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹³⁵ HAMIDI & JAYAKODY, *supra* note 107, at 28; *see also* Dempsey & Thier, *supra* note 55, at 5–6.

B. The Final Outcome of Deferrals on the Powers of the Supreme Court and the Commission

Using constitutional deferrals on the powers of the Supreme Court, the legislature stripped the Supreme Court of its power to interpret the Constitution and exercise all judicial review. Furthermore, by adopting constitutionally-mandated legislation the legislature established a rival institution, the Commission, and empowered it to interpret the Constitution.¹³⁶ Similarly, soon after the Commission was established in 2010, the executive began to strengthen the Commission vis-à-vis the Supreme Court. The Commission requested the executive send the Commission all draft governmental bills for a review of their constitutionality before approval by the Parliament.¹³⁷ In response, President Karzai issued Decree No. 11371 authorizing the Commission to perform *a priori* review of all governmental bills.¹³⁸ This meant that the Supreme Court would not be able to exercise *a priori* review of legislation. In other words, when the Commission performs *a priori* review, it precludes the Supreme Court from performing such *a priori* reviews of draft bills.¹³⁹

Moreover, although President Karzai and his government initially opposed the Commission's power to interpret the Constitution, shortly after the Commission was established, they began sending the Commission interpretive requests on constitutional questions.¹⁴⁰ The executive thus, in essence, acquiesced to the Commission's power to interpret the Constitution, perform *a priori* review of laws, and offer legal advice to the political branches on constitutional questions.¹⁴¹ In fact, President Karzai and his administration began to play a strategic role, submitting simultaneous requests for judicial review and constitutional interpretation to both the Supreme Court and the Commission as a "means of hedging bets in case one institution offered a more favorable opinion."¹⁴²

For example, in 2010, a dispute emerged over the result of

¹³⁶ See Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹³⁷ See generally Worden & Sinha, *supra* note 95.

¹³⁸ *Id.*

¹³⁹ Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82.

¹⁴⁰ See Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹⁴¹ *Id.*

¹⁴² See generally Worden & Sinha, *supra* note 95; Pasarlay, *Constitutional Interpretation*, *supra* note 55.

parliamentary elections between the government of President Karzai and Afghanistan's electoral institutions, the Independent Election Commission ("IEC") and the Independent Election Complaints Commission ("IECC").¹⁴³ Karzai claimed the 2010 parliamentary election was plagued with fraud and systemic electoral engineering.¹⁴⁴ The IEC claimed that it had the power to hear and resolve electoral complaints.¹⁴⁵ Karzai, however, established a special court to resolve the electoral disputes.¹⁴⁶ No laws in Afghanistan, including the Constitution and electoral laws, provide for a special court to review election results.¹⁴⁷ The Constitution and electoral laws vest the power to resolve electoral disputes in the IEC and the IECC.¹⁴⁸ The question of the constitutionality of the Special Election Court ("SEC") thus caused consternation. The Commission held the SEC unconstitutional, arguing that the IEC and the IECC have the power to resolve electoral disputes.¹⁴⁹ Seeing that the Commission declared the SEC unconstitutional, President Karzai asked the Supreme Court to rule on the constitutionality of the SEC.¹⁵⁰ The Supreme Court promptly ruled that the establishment of the SEC to investigate electoral complaints was consistent with the Constitution.¹⁵¹ The Supreme Court's decision angered the winning candidates to the Parliament who refused to accept the opinion of the Supreme Court, arguing that the Supreme Court's jurisdiction was limited to the review of the constitutionality of legislation under Article 121 of the Constitution, and that the Supreme Court's powers did not extend to resolving electoral disputes.¹⁵²

¹⁴³ NAT'L DEMOCRATIC INST., THE 2010 WOLESI JIRGA ELECTIONS IN AFGHANISTAN 15 (2011), <https://www.ndi.org/files/Afghanistan-2010-election-observers-final-report.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ DEMOCRACY INT'L, ELECTION OBSERVATION MISSION TO AFGHANISTAN: PARLIAMENTARY ELECTIONS 2010, at 43–44 (2011), http://democracyinternational.com/media/DI%20Afghanistan%202010%20EOM%20Final%20Report_web.pdf; GHIZAAL HARESS, AFG. RESEARCH & EVALUATION UNIT, ADJUDICATING ELECTION COMPLAINTS: AFGHANISTAN AND THE PERILS OF UNCONSTITUTIONALISM 20–21 (2014), [http://www.areu.org.af/Uploads/EditionPdfs/1404E%20Adjudicating%20Election%20Complaints%20A%20Case%20Study%20of%20the%20Special%20Election%20Tribunal%20-%202010%20\(2\).pdf](http://www.areu.org.af/Uploads/EditionPdfs/1404E%20Adjudicating%20Election%20Complaints%20A%20Case%20Study%20of%20the%20Special%20Election%20Tribunal%20-%202010%20(2).pdf).

¹⁴⁷ *Id.*

¹⁴⁸ Electoral Law art. 57, OFFICIAL GAZETTE No. 1012 (2010).

¹⁴⁹ Legal Opinion of the Independent Commission for Overseeing the Implementation of Constitution, Reviewing the Constitutionality of the Special Election Court to Adjudicate Complaints Related to the 2010 Parliamentary Election (2010).

¹⁵⁰ See Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan*, 26 MICH. STATE INT'L. L. REV. 245, 272–75 (2018).

¹⁵¹ DEMOCRACY INTERNATIONAL, *supra* note 146, at 45.

¹⁵² *Id.*; see generally HARESS, *supra* note 146.

Therefore, constitutional deferrals on the powers of the Supreme Court and the Commission took Afghan constitutional politics in an uncharted direction. In the absence of clear constitutional provisions defining the powers of the Supreme Court and the Commission, the political branches of the government adopted legislation that vested two different bodies with the power to interpret the Constitution and exercise different types of judicial review powers.¹⁵³ Apparently, politicians and courts alike have started to treat the vaguely-described Commission as a *de facto* constitutional court with the power of pre-promulgation abstract review, while treating Afghanistan's Supreme Court as a body empowered to carry out post-promulgation abstract review of legislation and concrete judicial review.¹⁵⁴ This dual institutional mechanism is a counterproductive development that the makers of the 2004 Constitution had hoped to avoid after they removed the constitutional court from the earlier drafts of the 2004 Constitution.

V. DEFERRAL AS A TOOL TO UNDERMINE THE INDEPENDENCE OF THE SUPREME COURT AND THE COMMISSION

Deferrals on the powers of the Supreme Court and the Commission not only undermined the power, independence, and institutional security of these two bodies, but also gave the legislature too much power and discretion vis-à-vis the judiciary. In fact, these deferrals gave the legislature a tool to use against the Supreme Court and the Commission any time it desires. The text of Article 121, which in essence describes the Supreme Court's judicial review power, leaves many questions open.¹⁵⁵ It does not make clear whether the Supreme Court possesses the power to interpret the Constitution and exercise all forms of judicial review functions.¹⁵⁶ In addition, it remains contested to this day which institution can resolve political disputes that arise between the legislature and the executive (like the case of Spanta).¹⁵⁷ Under the 2004 Constitution, answers to all of these important questions require the approval of the legislature. Unless the legislature is willing to resolve them, they will remain unresolved

¹⁵³ See Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹⁵⁴ *Id.*

¹⁵⁵ AFG. CONST. 2004 art.121.

¹⁵⁶ *Id.*

¹⁵⁷ See Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82.

indefinitely, or they will be resolved in a way that undermines the powers and independence of the judiciary.

Although the Supreme Court on several occasions tried to clarify these questions by proposing constitutionally-mandated legislation under Article 121,¹⁵⁸ the legislature refused to approve any laws that would empower the Supreme Court to resolve political cases or interpret the Constitution.¹⁵⁹ Part of the reason is that, under Article 121 of the Constitution, only the government and courts have the right to challenge the constitutionality of legislation and make constitutional interpretation requests to the Supreme Court.¹⁶⁰ This mechanism does not give the legislature or other institutions (such as political parties) standing to challenge the constitutionality of laws or executive action before the Supreme Court.¹⁶¹ Apparently for this very reason, the legislature refuses to empower and accept the Supreme Court as a constitutional interpretation body.

Moreover, in the post-Spanta controversy, the Supreme Court's legislative proposals, which attempted to authorize the Supreme Court to interpret the Constitution and resolve political disputes, created political backlashes that severely limited the power of the Supreme Court to interpret the Constitution and to exercise all types of constitutional review functions.¹⁶² Fearing further repercussions, the Supreme Court tried to propose legislation to clarify its constitutional jurisdiction—thereby leading to troubling gaps in Afghanistan's constitutional review system.¹⁶³ For example, no institution apparently has the power to resolve a dispute that stems from the implementation of law and the exercise of legal authority between the legislature and the executive.¹⁶⁴ As a result, many recent constitutional disputes between the legislature and the executive were

¹⁵⁸ See Dempsey & Thier, *supra* note 55, at 4–5; Pasarlay, *Constitutional Interpretation*, *supra* note 55.

¹⁵⁹ Dempsey & Thier, *supra* note 55, at 5.

¹⁶⁰ AFG. CONST. 2004 art 121; *see also* Grote, *supra* note 103, at 911.

¹⁶¹ Grote, *supra* note 103, at 911.

¹⁶² See Dempsey & Thier, *supra* note 55, at 3–4; KAMALI, *supra* note 71, at 10–11; Worden & Sinha, *supra* note 95, at 2.

¹⁶³ *See generally* HARESS, *supra* note 146.

¹⁶⁴ Worden & Sinha, *supra* note 95, at 2–3; Pasarlay, *When Courts Decide not to Decide*, *supra* note 82.

ultimately resolved through politics and political intervention without the intervention of either the Supreme Court or the Commission.¹⁶⁵

The Supreme Court is not the only institution that has suffered because the drafters of the 2004 Constitution decided to defer on its powers. Today, the Commission is in an awkward position, primarily because of deferrals on its powers and organization.¹⁶⁶ While the Parliament empowered the Commission to interpret the Constitution and perform *a priori* review of governmental bills, it has usually resorted to retaliatory measures every time the Commission has decided a case in a way that has not secured the interests of the Parliament.¹⁶⁷ For instance, in the later years of President Karzai's term, when the Commission issued a large number of interpretive and advisory opinions that favored the executive,¹⁶⁸ Parliament retaliated by impeaching the Commission's members and refusing to approve the sitting members in office for a second term.¹⁶⁹ In addition, the Parliament has several times threatened to amend the law of the Commission and strip it of its constitutional interpretation and abstract constitutional review powers—threats that have severely undermined the independence and institutional viability of the Commission.¹⁷⁰

For example, in July 2016, on the request of President Ashraf Ghani, the Commission issued an opinion clarifying the legal status of Presidential Decree No. 159 on election reform.¹⁷¹ The lower house of the Parliament,

¹⁶⁵ Worden & Sinha, *supra* note 95, at 3–4.

¹⁶⁶ See Ali Yawar Adili & Ehsan Qaane, *The Constitutional Oversight Commission in a Standoff with President Ghani: Defending Their Independence or Covering up Mistakes?*, AFG. ANALYSTS NETWORK (Aug. 4, 2017), <https://www.afghanistan-analysts.org/the-constitutional-oversight-commission-in-a-standoff-with-president-ghani-defending-their-independence-or-covering-up-mistakes/>.

¹⁶⁷ Khawaja Basir Fitri, *WJ Summons ICOIC Members on Electoral Reform Decree*, PAJHWAK AFGHAN NEWS (Sept. 17, 2016, 4:11 PM), <http://www.pajhwok.com/en/2016/09/17/wj-summons-icoic-members-electoral-reform-decree>.

¹⁶⁸ See generally MAJMUA-YE TAFSIR HA, NAZARIYA HA WA MASHWARA HAI HUQUQI-YE KAMISON-I MUSTAQIL-I NIZARAT BAR TATBIQ-I QANUN-I ASSASI [THE COLLECTION OF INTERPRETIVE AND LEGAL ADVICE OF THE INDEPENDENT COMMISSION FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION] (2014).

¹⁶⁹ *Parliament Did Not Issue Vote of Confidence to the Members of the Independent Commission for the Supervision of the Implementation of the Constitution*, BBC FARSI (July 28, 2014), http://www.bbc.com/persian/afghanistan/2014/07/140719_k05_afg_constitution_commission.

¹⁷⁰ See Adili & Qaane, *supra* note 166.

¹⁷¹ Under the National Unity Government Agreement, which brought the 2014 contested presidential election to an end, the government is required to amend the Afghan electoral system's laws and institutions, as well as the 2004 Constitution to include a post for a prime minister. However, reforming the electoral system has been problematic, as the parliament rejected several presidential decrees on election reform. See *Afghan Parliament Rejects President Ghani's Decree on Electoral Reforms*, KHAAMA PRESS (June 13,

the *Wolesi Jirga*, had rejected Presidential Decree No. 159.¹⁷² The upper house, however, had approved the decree.¹⁷³ A joint commission of the two houses was required by law.¹⁷⁴ However, before the joint commission could decide the fate of Decree No. 159, the Parliament went on a summer recess.¹⁷⁵ President Ashraf Ghani referred Presidential Decree No. 159 to the Commission and requested its opinion on (1) the legal status of Decree No. 159, (2) whether the president could issue another decree on electoral reform during parliamentary recess, and (3) whether the president was required to submit the new electoral reform decree to the Parliament for approval after it reconvened.¹⁷⁶

The Commission held that, when a joint commission of the two houses of the Parliament rejects a presidential decree, the decree becomes legally invalid.¹⁷⁷ However, the Commission stated that the president could issue another electoral reform decree when the Parliament is in recess.¹⁷⁸ The Commission further clarified that the president is not required to submit the new electoral reform decree to the Parliament for approval in the Parliament's last year in office under Article 109 of the Constitution.¹⁷⁹ Article 109 of the Constitution states that any proposals for amending the election laws should not be included in the agenda of the Parliament for consideration in the final year of its term.¹⁸⁰ Citing this Article, the Commission held that the president is not required to seek the approval of the Parliament on the new electoral reform decree because the Parliament is in the last year of its term.¹⁸¹ Two earlier electoral reform decrees had already been rejected by the Parliament.¹⁸² The Parliament expected that the

2016), <http://www.khaama.com/afghan-parliament-rejects-president-ghanis-decree-on-electoral-reforms-01242>.

¹⁷² *See id.*

¹⁷³ *Id.*

¹⁷⁴ AFG. CONST. 2004 art. 100.

¹⁷⁵ Legal Opinion of the Independent Commission for Overseeing the Implementation of Constitution Regarding the Request of the President on the Legal Status of Presidential Decree No. 159 Enacting the Law on the Organization, Jurisdiction and Duties of the Independent Electoral Commission and Electoral Complaints Commission, Opinion No. 5 (2016) [hereinafter Commission's Decree No. 159 Opinion].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ AFG. CONST. 2004 art. 109.

¹⁸¹ Commission's Decree No. 159 Opinion, *supra* note 175.

¹⁸² Ali Yawar Adili et al., *Another Hurdle for Elections in 2016: MPs Reject Presidential Decree on Electoral Reform*, AFG. ANALYSTS NETWORK (June 17, 2016), <https://www.afghanistan-analysts.org/another-hurdle-for-elections-in-2016-mps-reject-presidential-decree-on-electoral-commissions/>.

executive would submit any electoral reform decree for approval to the Parliament after it reconvened. However, this did not happen and the next presidential decree on electoral reform became enforceable law without parliamentary approval.¹⁸³

The Parliament reacted strongly to the Commission's opinion on Presidential Decree No. 159 and threatened to retaliate.¹⁸⁴ The Parliament first tried to impeach the members of the Commission and summoned them for questioning.¹⁸⁵ However, the members of the Commission refused to respond to the request of the Parliament.¹⁸⁶ They stated that the Parliament did not have the right to impeach the members of the Commission.¹⁸⁷ The Commission argued that the Parliament could only impeach governmental ministers and the justices of the Supreme Court under the Constitution, not the members of the Commission.¹⁸⁸ This move further infuriated the Parliament; it argued that it had the right to impeach any government official to whom it gives a vote of confidence.¹⁸⁹ The Commission still chose not to appear before the Parliament for questioning.¹⁹⁰

When the Parliament failed to impeach the members of the Commission, it then threatened to resort to further retaliatory measures to undermine the independence of the Commission.¹⁹¹ Chief among them, the Parliament warned that it would amend the law of the Commission to reduce the Commission's powers over constitutional questions, specifically its power to interpret the Constitution, provide legal advice, and perform *a priori* review of legislation.¹⁹² This threat forced the Commission to issue an opinion clarifying its position and trying to calm the increasing rift with the Parliament,¹⁹³ but the Parliament was not convinced.¹⁹⁴

¹⁸³ See Ali Yawar Adili & Martine van Bijlert, *Update on Afghanistan's Electoral Process: Electoral Deadlock Broken—For Now*, AFG. ANALYSTS NETWORK (Dec. 18, 2016), <https://www.afghanistan-analysts.org/update-on-afghanistans-electoral-process-electoral-deadlock-broken-for-now/>.

¹⁸⁴ Basir Fitri, *supra* note 167.

¹⁸⁵ *Id.*

¹⁸⁶ Legal Opinion of the Independent Commission for Overseeing the Implementation of Constitution with Respect to Parliament's Invitation of the Commission's Members for Impeachment (2016) [hereinafter Commission's Impeachment Opinion].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Basir Fitri, *supra* note 167.

¹⁹⁰ Commission's Impeachment Opinion, *supra* note 186.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

Although the Parliament has not yet decided when (and whether) to amend the law of the Commission, its threat to do so has been a direct attack on the independence of the Commission. Indeed, the Parliament might not choose to strip the Commission of its power to interpret the Constitution and offer legal advice on constitutional matters because doing so will eliminate the venue in which the Parliament can challenge governmental conduct for constitutionality and request interpretive constitutional opinions. However, the fact that the Parliament threatened to amend the law of the Commission is a clear warning that going against the Parliament might trigger severe repercussions and political backlash that would undermine the legitimacy, independence, impartiality, and institutional security of the Commission, thus reducing its power.

This threat has already proved to be effective. In November 2016, Parliament voted to strip seven cabinet ministers of their ministerial posts over their failure to spend seventy percent of their developmental budget.¹⁹⁵ President Ashraf Ghani requested that the Supreme Court examine the constitutionality of the Parliament's decision to remove these ministers.¹⁹⁶ Parliament reacted strongly to the president's referral and argued that the Supreme Court did not have jurisdiction to hear such cases under Article 121 of the Constitution.¹⁹⁷ Despite opposition from the Parliament, the Supreme Court decided to review the constitutionality of the Parliament's power to remove these ministers from office.¹⁹⁸ Interestingly, however, the Commission was reluctant to enter into this debate. The Commission stated that, although the Parliament has a legal right to summon and impeach governmental ministers, the current series of impeachments shall be assessed by the Supreme Court to determine whether the removal of ministers by the Parliament has been "explicit" and "based on convincing reasons," as described in Article 92 of the Constitution.¹⁹⁹ It seems that the Commission did not try to seek jurisdiction over this dispute, which clearly involved constitutional interpretation. Apparently, the Commission feared that its

¹⁹⁵ See *MPs Dismiss Another Minister, Bringing Total to 7 in 4 Days*, TOLONews (Nov. 15, 2016), <https://www.tolonews.com/afghanistan/28355-mps-dismiss-another-minister-bringing-total-to-7-in-4-days>; *Afghan Govt Reacts Strongly as Parliament Dismiss 3 Ministers*, KHAAMA PRESS (Nov. 12, 2016, 8:27 PM), <http://www.khaama.com/afghan-govt-reacts-strongly-as-parliament-dismiss-3-ministers-02264>.

¹⁹⁶ See *Afghan Govt Reacts Strongly as Parliament Dismiss 3 Ministers*, *supra* note 195.

¹⁹⁷ See Mirabed Joyenda, *Govt Criticized for Its Issues Around the Dismissal of Ministers*, TOLONews (Nov. 21, 2016), <https://www.tolonews.com/afghanistan/govt-criticized-its-issues-around-dismissal-ministers>.

¹⁹⁸ Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82.

¹⁹⁹ AFG. CONST. 2004 art. 92; see also Pasarlay, *When Courts Decide Not to Decide*, *supra* note 82.

decision might create strong opponents who would reject its decision, which may in turn threaten its independence and institutional viability.

In this way, the political branches of the government have taken advantage of constitutional deferrals on the powers of the Supreme Court and the Commission to threaten the Court and the Commission's institutional security, undermine their independence and impartiality, and limit their powers. Moreover, the Parliament is basically taking the law of the Commission hostage, using it against the Commission whenever the Commission issues an opinion that does not secure the interests of the Parliament. The matter is further complicated because both the Supreme Court and the Commission have no means to resist the Parliament in this respect.

VI. CONCLUSION

Theorists of constitutional deferral argue that an optimal level of constitutional deferral provides a significant and valuable mechanism for constitutional writers.²⁰⁰ Constitutional deferrals might help promote agreement at the constitution drafting and ratifying stage. Deferral might further increase constitutional flexibility by explicitly entrusting constitutional questions to the legislature by authorizing or requiring them to address some constitutionally significant questions via sub-constitutional legislation. This technique might lead to the survival of formal written constitutions and help promote constitutional stability.²⁰¹ At the same time, however, deferral is not optimal for all constitutional issues. It is important that constitutional framers do not rely heavily on deferral. Specifically, they should settle important procedural questions in the constitution so that the function of government is not impeded.²⁰² Theorists of constitutional deferral argue that if too many significant constitutional questions are explicitly deferred to ordinary legislation, the constitution might become more fragile and have less longevity.²⁰³

Importantly, thus far, the history of the 2004 Constitution of Afghanistan suggests that in addition to the constitutional fragility created

²⁰⁰ See generally Dixon & Ginsburg, *supra* note 1.

²⁰¹ See *id.* at 637–38.

²⁰² *Id.* at 664.

²⁰³ *Id.* at 666–67.

through the use of too many deferrals, deferring to articulate the powers of the institutions entrusted to resolve other deferrals may also create constitutional instability. Deferral on the powers and organization of such institutions may result in direct political conflicts between the judiciary and the legislature because deferral politicizes the relationship between the legislature and the judiciary. The politicization of the relationship between the legislature and the judiciary might in turn put the institutional security and independence of the judiciary at stake. Particularly, in fragile and transitioning democracies like Afghanistan, these types of deferrals create serious problems. In these new democracies, the legislature may be ill-equipped to deal with unresolved issues of the powers and organization of apex courts. In such contexts, as occurred in Afghanistan, unresolved questions of the powers of institutions expected to resolve implicit deferrals engender costly political crises every time a dispute emerges between the legislature and the executive. Furthermore, such deferrals lead to the failure of apex constitutional courts to resolve some key constitutional questions.

The history of the 2004 Constitution of Afghanistan suggests that it is important that constitutional designers decide the important question of the powers of constitutional interpretation bodies in the text of the constitution. If constitutions defer on these questions, downstream legislatures may refuse to empower such institutions, leading to political tension among the various branches of the government. More controversially, downstream legislatures might simply take by-law deferrals hostage and keep constitutional review and constitutional interpretation bodies under their watch by threatening to amend their law and strip them of their powers any time it favors the legislature.

The decision of the makers of the 2004 Constitution of Afghanistan to defer on the powers of the Supreme Court to interpret the Constitution, and on the mandate of the Commission and the subsequent reactionary parliamentary legislations clearly highlight these dangers. In the Afghan example, we see how the legislature used by-law deferrals not only to undermine the independence of the Supreme Court but also to create a rival constitutional interpretation body—the Commission—thereby limiting the powers of the Supreme Court. As a result, there is no unified hierarchical institutional mechanism to interpret the Constitution and exercise all types of constitutional review. Instead, many constitutional disputes are resolved through politics rather than judicial intervention.

Finally, deferral on the powers of the Supreme Court and the Commission has led to a troubling gap in Afghanistan's judicial review system. Today, no institution can hear and resolve disputes stemming from the implementation of law and the exercise of legal authority between the legislature and the executive (cases like that of Minister Spanta). Although the Supreme Court tried to clarify this question in the aftermath of the Spanta controversy, the Parliament rejected the Supreme Court's proposal, which also triggered a political backlash against the institutional security of the Supreme Court. As a result, the question remains unclear because the legislature simply does not want to have the Supreme Court (or any other institution for that matter) serve as a check on its powers, especially on its power to appoint and remove government ministers and Supreme Court justices. This deferral has further deprived Afghanistan of a crucial mechanism to institutional democracy by safeguarding the Constitution.

In short, authorizing or requiring the legislature to address the powers and organization of apex courts via sub-constitutional lawmaking is dangerous because downstream legislatures will rarely limit their own powers by such authorization of courts. Constitution makers need to decide what powers these institutions shall enjoy, thus avoiding constitutional crises of the type we saw in Afghanistan. If constitution makers do not address these questions, the legislatures will likely never address them—leading to direct conflicts between the legislature and the judiciary. If not addressed, these conflicts will undermine the independence, authority, and institutional security of the judiciary.

